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Express Warranties Arising From Advertising

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EXPRESS WARRANTIES ARISING FROM ADVERTISING

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"Promise, large promise, is the soul of an advertisement"
Samuel Johnson,
The Idler No. 41

I. GENERAL BACKGROUND

SINCE THE height of the Industrial Revolution and particularly in this century, the merchants and manufacturers of our nation have found their business responsibilities and obligations constantly changing as courts evolved and redefined the rules governing the traditional manufacturer-merchant-consumer relationships. *Caveat emptor* has made an osmotic migration from the law of sales to the realm of legal history, while such concepts as strict liability in tort and implied warranty have become the 20th century judicial response to 20th century marketing and technology. In this evolutionary period nearly every aspect of the manufacturer-merchant-consumer relationship has received judicial scrutiny. Advertising has been no exception. In the late 1920's and early 1930's, at a time that was coincidental with the beginning of mass advertising efforts in the United States, the courts began to express concern about the advertising aspect of the manufacturer-merchant-consumer relationship. Most early cases that considered false or misleading advertisements were analyzed in terms of negligence[1] or misrepresentation.[2] Soon, however, many courts abandoned these rather cumbersome analyses and began to characterize and analyze actions based on false or misleading advertisements as stating claims

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[1] *See* Hruska v. Parke, Davis & Co., 6 F.2d 536 (8th Cir. 1925); Jones v. Raney Chevrolet Co., 213 N.C. 775, 197 S.E.2d 757 (1938).

[2] *See* Alpine v. Friend Bros., 244 Mass. 164, 138 N.E. 553 (1923).

for breach of express warranty. Today, the great majority, if not all, jurisdictions use the express warranty analysis in considering damage claims based on false or misleading advertisements.[3]

II. BENCH-MARKS IN THE EVOLUTION OF ADVERTISING WARRANTIES

As previously indicated, some courts initially tended to analyze false and misleading advertisements in the context of actions for negligence or misrepresentation. The landmark case of *Baxter v. Ford Motor Co.*,[4] however, ordained the coming of age of advertising warranties. In 1930, Mr. Baxter bought a new Model A Ford Town Sedan from his local Ford dealer. In the course of reaching his decision to purchase the auto, Mr. Baxter was furnished certain Ford advertising material. This material included references to the "Triplex Shatter-Proof Glass Windshield" which was constructed so "that it will not fly or shatter under the hardest impact." Unabashed, Ford continued, "[T]his is an important safety factor because it eliminates the dangers of flying glass." Shortly after the purchase, a pebble proved conclusively that the Triplex Shatter-Proof Glass Windshield would, under certain circumstances, shatter. Mr. Baxter was injured and brought suit against Ford based on the "shatter-proof" advertisement. Ford urged that no warranty could exist without privity and, further, that express warranties "do not attach themselves to, and run with, the article sold." The Washing-

[3] Courts have had occasion to consider nearly all advertising methods in connection with "advertising" warranties:

(a) newspapers—Lane v. Swanson & Sons Co., 130 Cal. App. 2d 210, 278 P.2d 723 (1955);
(b) pamphlets—Hansen v. Firestone Tire & Rubber Co., 276 F.2d 254 (6th Cir. 1960);
(c) catalogues—Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1939);
(d) radio—Bahlman v. Hudson Motor Co., 290 Mich. 683, 288 N.W. 309 (1939);
(e) billboards—*Id.*
(f) magazines—Pritchard v. Liggett-Myers Tobacco Co., 295 F.2d 292 (3rd Cir. 1961);
(g) advance bulletin—Sawan, Inc. v. American Cyanimid, 211 Ga. 764, 88 S.E.2d 152 (1955);
(h) pictures—Sylvestri v. Warner & Swasey Co., 398 F.2d 598 (2d Cir. 1968);
(i) "all media"—Ford Motor Co. v. Lemieux, 418 S.W.2d 909 (Tex. Civ. App. 1967).

[4] 168 Wash. 456, 12 P.2d 409 (1939).

ton Supreme Court responded with language that was to become the oft-quoted basis for advertising warranties:

> Since the rule of *caveat emptor* was first formulated, vast changes have taken place in the economic structures of the English speaking peoples. Methods of doing business have undergone a great transition. Radio, billboards, and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess, and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable.[5]

In 1936, the Hudson Motor Company, not to be outdone by Ford's Triplex Shatter-Proof Glass Windshield, heavily advertised its new Hudsons and Terraplanes as possessing "safety engineered" bodies complete with "an improved seamless steel roof." Much like Mr. Baxter, Mr. Bahlman purchased a new 1936 Model Hudson Eight Sedan after reading the advertisements. Shortly thereafter, Mr. Bahlman had a roll-over type accident and suffered severe lacerations from a welded seam in the roof above the driver's seat—with the result that the facts underlying *Bahlman v. Hudson Motor Car Co.*[6] became history. The Michigan Supreme Court wholeheartedly embraced the *Baxter* rationale and *Bahlman* became the confirmation of the *Baxter* approach to advertising warranties.

More recently the Supreme Court of Ohio in *Rogers v. Toni Home Permanent Co.*[7] and the New York Court of Appeals in *Randy Knitware v. American Cyanamid Co.*[8] favorably re-examined the historical bases for "advertising" warranties. In *Randy Knitware* the court noted that *Baxter* had "breached the citadel of privity" and further stated:

> . . . in the 30 years which have passed since that decision [Baxter], not only have the courts throughout the country shown a marked, and almost uniform, tendency to discard the privity limitation and

[5] *Id.* at 459, 12 P.2d at 412.

[6] 290 Mich. 683, 288 N.W. 309 (1939).

[7] 167 Ohio 244, 147 N.E.2d 612 (1958).

[8] 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

> hold the manufacturer strictly accountable for the truthfulness of representations made to the public and relied upon by the plaintiff in making his purchase, but the vast majority of the authoritative commentators have applauded the trend and approved the result.[9] (footnotes omitted)

In 1965, the law of advertising warranties was distilled into the Restatement of Torts 2d, Section 402B:

> One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation even though:
> (a) it is not made fraudulently or negligently, and
> (b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.[10]

Similarly, Section 2-313 of the Uniform Commercial Code provides:

> (1) Express warranties by the seller are created as follows:
> (A) Any affirmation of fact or promise made by the seller to the Buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.[11]

Numerous cases have held that Section 2-313 encompasses advertising warranties.[12] Thus, advertising warranties not only have achieved considerable vitality in modern case law but have also been codified and widely adopted in that form.

III. The Law of Advertising Warranties

In broad overview, the establishment of an action based on advertising warranty requires proof as to the following:

1. *Falsity*: Any claim based on breach of an advertising warran-

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[9] *Id.* at 12-13, 181 N.E.2d at 402, 226 N.Y.S.2d at 367-68.

[10] Restatement (Second) of Torts § 402B (1965).

[11] Uniform Commercial Code § 2-313.

[12] Maryland Casualty Co. v. Conner, 382 F.2d 395 (10th Cir. 1967); Capital Equipment Enterprises v. North Pier Terminal Co., 117 Ill. App. 2d 264, 254 N.E.2d 542 (1969); Hawkins Construction Co. v. Matthews Construction Co., 190 Neb. 546, 209 N.W.2d 643 (1973).

ty must establish that the portion of the advertisement in question is false (*i.e.*, is a misrepresentation). As in libel and slander, truth is a defense.[13] The courts generally refer to the falsity issue in terms of showing the breach of the warranty.

2. *Reliance:* A consumer asserting a claim founded on an advertising warranty must show reasonable reliance on the particular portion of the advertisement being challenged.[14] Some courts have articulated the necessary reliance in terms of requiring the advertisement to "induce the purchase or use of a product."[15] The Uniform Commercial Code requires that the advertisement become a "basis of the bargain,"[16] while the Restatement uses the phrase "justifiable reliance."[17] Besides constituting an independent element of modern warranty actions, reliance on the advertisements also provided an underpinning for the movement against the privity requirement.[18]

3. *Proximate cause*: A claimant bringing an action for breach of an advertising warrant must establish that the breach of the warranty was a proximate cause of the damages sought.[19] It should be specifically noted that reliance in the purchase or use of the product and causation between a breach of the warranty and the damages sought are two independent elements to be established.

4. *Intent*: Proof of the advertiser's specific intent to "warrant" the product need not be shown in order to establish a cause of action, at least when a reasonable buyer would believe that the words

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[13] *See, e.g.*, Schemel v. General Motors Corp., 261 F. Supp. 134 (S.D. Ind. 1966).

[14] Gherna v. Ford Motor Co., 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966); Pedroli v. Russell, 157 Cal. App. 2d 281, 320 P.2d 873 (1958); Bleacher v. Bristol-Myers Co., 53 Del. 1, 163 A.2d 526 (1960); Capital Equipment Enterprises v. North Pier Terminal Co., 117 Ill. App. 2d 264, 254 N.E.2d 542 (1969).

[15] *See* Alpine v. Friend Bros., 244 Mass. 164, 138 N.E. 553 (1923); Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N.W.2d 151 (1957).

[16] UNIFORM COMMERCIAL CODE § 2-313.

[17] RESTATEMENT (SECOND) OF TORTS § 402B (1965).

[18] *See, e.g.*, Randy Knitware v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1939).

[19] *See, e.g.*, Sylvestri v. Warner & Swasey Co., 398 F.2d 598 (2d Cir. 1968); Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939); Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N.W.2d 151 (1957).

used had the purpose of inducing a sale.[20] Of course, an advertisement is, almost by definition, intended to contain words to induce a sale. Thus, in practical terms, there is no requirement of intent.

5. *Language Used In The Advertisement:* Probably the most substantive aspect of a claim based on breach of an advertising warranty relates to the actual language used in the alleged warranty. The advertising must be examined to determine if it can be characterized as "fact," "material fact," "opinion," "comparison," "specific," "general," "description," "estimate," "judgment," "condition," "dealer's talk," "puffing," "praise," or any one of a multitude of other characterizations the courts have used in particular cases. In essence, the advertising language relied on must represent some fact to constitute an express warranty. The categorization of the types of statements that cannot be the basis of an advertising warranty was typically stated by the Nebraska Supreme Court in *Brown v. Globe Laboratories, Inc.*[21] as follows:

> [R]epresentations which merely express the vendor's opinion, belief, judgment, or estimate do not constitute a warranty. Dealer's talk is permissible; and puffing, or praise of the goods by the seller, is no warranty, such representations falling within the maxim *simplex commendatio non obligat.*[22]

Unfortunately, these classifications, while easy to state, are much more difficult to apply. Like beauty, the distinction between "facts," "opinions," "sales talk," etc., seems often to be affected by the eye of the beholder. How does one then determine what language can establish an advertising warranty? It is settled that the language need not expressly use the terms "warrants," "guarantees," or words of similar import.[23] Most authorities, however, indicate that a specific factual assertion is strictly required to establish a warranty. These authorities are typified by the statement in *Adkins v. Ford Motor Co.*, that "a particular and specific statement concerning quality or fitness" is required.[24] The element of specificity, how-

[20] *See, e.g.*, Hansen v. Firestone Tire & Rubber Co., 276 F.2d 254 (6th Cir. 1960); Turner v. Central Hardware Co., 353 Mo. 1182, 186 S.W.2d 603 (1945).

[21] 165 Neb. 138, 84 N.W.2d 151 (1957).

[22] *Id.* at —, 84 N.W.2d at 161, quoting from Ralston Purina Co. v. Iiams; 143 Neb. 588, 10 N.W.2d 452 (1943).

[23] *Supra* note 20.

[24] 446 F.2d 1105, 1108 (6th Cir. 1971) (The court was applying Tennessee law).

ever, has occasionally been relaxed, as when an Ohio court deemed the words "good condition" to be a warranty when used in an advertisement for the sale of a secondhand piano.[25]

The advertising warranty cases most significant to practitioners in the field of products liability, particularly in the aircraft litigation area, are those involving advertising language relating to safety. A case which typifies courts' reaction to safety language is *Turner v. Central Hardware Co.*[26] The defendant advertised its "safety-first" ladders stating that, "in designing our ladders the prime consideration was safety—and that's what you'll find in these splendid ladders."[27] A rung broke, the plaintiff fell and the Missouri Supreme Court ultimately concluded that the safety language in the advertisement constituted an express warranty. The court specifically rejected the contention that the language was only "opinion" or "sales talk."[28] Similarly, advertisements extolling a home-permanent as being "safe and harmless,"[29] a toy pistol as being "absolutely harmless,"[30] and skin cream as being "clinically proven and absolutely safe"[31] have been held to provide proper bases for advertising warranties. One court has been more lenient by concluding an advertisement that "their product offered unprecedented safety" was mere "opinion" and permissible "puffing."[32]

In determining if advertising language gives rise to an express warranty, a California court held that the language must be construed liberally in favor of the buyer.[33] Also, in cases involving large scale multi-media advertisements, judicial notice has been taken of the advertisements.[34]

6. *Disclaimer.* The unusual circumstances in which an advertiser would attempt to disclaim the language used in an advertise-

[25] Schwartz v. Gross, 93 Ohio App. 445, 114 N.E.2d 103 (1952).

[26] 353 Mo. 1182, 186 S.W.2d 603 (1945).

[27] *Id.* at —, 186 S.W.2d at 605.

[28] *Id.* at —, 186 S.W.2d at —.

[29] Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

[30] Crist v. Art Metal Works, 230 App. Div. 114, 243 N.Y.S. 496 (1930).

[31] Spiegel v. Saks 34th St., 43 Misc.2d 1066, 252 N.Y.S. 852 (Sup. Ct. 1964).

[32] Hoffman v. A. B. Chance Co., 339 F. Supp. 1385, 1388 (M.D. Pa. 1972).

[33] Lane v. C. A. Swanson & Sons, 130 Cal. App. 2d 210, 278 P.2d 723 (1955).

[34] Gherna v. Ford Motor Co., 246 Cal. App. 2d 639, —, 55 Cal. Rptr. 94, 103 (1966).

ment and then rely on the disclaimer as a defense in an advertising warranty case has not been directly litigated. One would presume, however, that courts would be as reluctant to enforce disclaimers in this area as they have been in other sales cases and would impose all the requirements of conspicuousness, specificity, etc. One court that has considered an alleged disclaimer of an "advertising" warranty demonstrated considerable hesitancy in recognizing this defense.[35]

7. *Dealer's Responsibility For Manufacturer's Advertising.* Generally, the entity making an express warranty is liable for the breach thereof, and an entity which has not joined in the warranty cannot be held liable. In the case of advertising warranties made by a manufacturer, however, it appears that the dealer is liable for breach of warranty if the manufacturer's pamphlets or written advertisements which establish the warranty are furnished by the retailer to the consumer.[36] A dealer would seem to risk liability for the manufacturer's advertising warranties by bringing them to the attention of the purchaser. This would appear to be the case even though the dealer may not actually or expressly affirm the warranties.

IV. CONSIDERATIONS AND REFLECTIONS ON THE UTILIZATION AND DEFENSE OF CLAIMS FOR BREACH OF AN ADVERTISING WARRANTY.

The facts giving rise to many product liability cases make the strict liability in tort approach much more attractive than breach of an advertising warranty. In this day and age, lawyers, courts, and probably juries are more attuned to the "defect" and "unreasonably dangerous" concepts embodied in the strict liability in tort theory. Lawyers should be aware, however, of possible benefits in some factual situations of combining the advertising warranty and strict liability in tort actions.

If a manufacturer or seller has been overzealous in advertising its product and if the consumer can show reliance, a claim for breach of an advertising warranty should be seriously considered.

[35] Cooper Painting & Coatings, Inc. v. SCM Corp., 62 Tenn. App. 13, 457 S.W.2d 864 (1970).

[36] Silverstein v. R. H. Macy & Co., 266 App. Div. 5, 40 N.Y.S. 916 (1943).

In some instances a warranty claim may be even more attractive than one based on strict liability in tort since no proof of a defect is required.[37] In essence, an advertiser may raise the legal standard of care that it owes to the purchasing public by making express representations in its advertising. The concept is succinctly stated in *Bryer v. Rath Packing Company*:

> In the instant case the packer of the chicken set its own standard of care and increased the necessary amount of care by expressly representing on the cans sold that the product was ready to serve and boned.[38]

The Sixth Circuit in *Hansen v. Firestone Rubber Co.* expressed the same concept another way:

> [T]he seller has bound himself unqualifiedly as to the existence of the characteristics of qualities warranted; and absolute liability against the warrantor is available to the buyer who is injured by the non-existence of such characteristics or qualities.[39]

Some circumstances may also arise for which particular advertisements can be effectively used to persuade the fact finder that a defect existed in connection with a strict liability in tort claim. In such circumstances, the easiest way to gain admission of the advertising evidence may be to include a claim for breach of an advertising warranty. At least one court has taken judicial notice of advertisements, and, in light of evidence reflecting the product's nonconformity with the advertisements, concluded that the ad was probative evidence of a defect.[40]

From the defense lawyer's standpoint, a motion for severance should be seriously considered if it appears that the advertising complained of could be of aid and comfort to the plaintiff where he combines strict liability in tort with an allegation based on ad-

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[37] Syvestri v. Warner & Swasey Co., 398 F.2d 598 (2d Cir. 1968).

[38] 221 Md. 105, —, 156 A.2d 442, 446 (1959).

[39] 276 F.2d 254, 257 (6th Cir. 1960).

[40] McCann v. Atlas Supply Co., 325 F. Supp. 701 (W.D. Pa. 1971). The court stated:

> Prospective purchases are the objects of sustained and vigorous advertising campaigns extolling the touchness of automobile tires, their reliability and dependability. Common experience indicates that no owner of a tire expects it to fail with less than 2,000 miles on its treads.

325 F. Supp. at 704.

vertising warranty. This is particularly true when it can be persuasively argued that the standard of care that the advertiser has imposed on himself is higher than the legal standard of care imposed by strict liability in tort theory. It seems certain that asking a jury to segregate evidence in the two different causes of action and to apply different standards of care thereto militates in favor of severance.

In defending advertising warranties, disregard privity and, except for some limited types of consequential damages, dismiss disclaimers as well. In most instances, the most vulnerable portion of the plaintiff's case is reliance and proximate cause, and this evidence can and should be rigorously attacked. A somewhat less effective defense is the "puffing" or "dealer's talk" exception to advertising warranties. To make this defense effective, a defendant has to overcome the inherent weakness of the "we said it, but you shouldn't have believed it" position. Finally, the fundamental defense of truth (absence of breach) may be available.

CONCLUSION

Throughout the last half of the 19th century and through most of this century, the pattern of commodity production in our nation has shifted from small-scale, cottage-type to large-scale, mass-oriented production. With the tremendous rise in our productive capabilities, private manufacturers have sought to utilize various means to maintain higher and higher levels of consumer demand for their goods. Advertising has provided a major tool for this demand-maintenance. Through the use of advertising on a national and regional scale, the manufacturers have reached directly into the marketplace of consumer transactions. By relying on these advertisements, the consuming public has made direct contact with manufacturers in this marketplace. Meanwhile, the small retail enterprise, which formerly provided direct market contact with the consumer, has faded into a relatively faceless and exchangeable entity under some direct or indirect control of the manufacturer.

It is no mere coincidence that cases involving the automobile industry, and Ford Motor Company in particular (i.e. *Baxter*), have been involved in landmark decisions in the advertising warranties field. This industry pioneered the use of assembly-line techniques of

production which so expanded our productivity. This resulting rise in output paralleled the growth in mass-distribution advertising. Objectively viewed, the ascendancy of advertising warranties probably reflects the capacity of American law to comprehend the changing American economic infrastructure and to mold itself in accordance with new problems and needs.

Case Notes